STATE OF MICHIGAN
IN THE
SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
E. FITZGERALD, P.J., R. BANDSTRA, and H. GAGE, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

-vs-

Supreme Court
No. 122696

DEON LAMONT CLAYPOOL,

Defendant-Appellee.
_____/

Court of Appeals No. 238984
Circuit Court No. 2001-177566-FH

BRIEF ON APPEAL—APPELLANT

ORAL ARGUMENT REQUESTED

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The Court of Appeals answered this question, "yes."

Defendant will argue the answer is, "yes."

The People contend the answer is, "no."

II. WHETHER A SENTENCING JUDGE SHOULD BE PROHIBITED FROM USING THE LEGISLATIVE SENTENCING GUIDELINES TO ASSIST IN DETERMINING THE DEGREE OF A DEPARTURE AFTER HAVING ALREADY DECIDED TO DEVIATE FROM A STATUTORILY MANDATED MINIMUM SENTENCE BASED ON A SUBSTANTIAL AND COMPELLING REASON?

The Court of Appeals answered this question, "no."

Defendant will argue the answer should be, "no."

The People contend the answer is, "no."

STATEMENT OF FACTS

Deon Lamont Claypool, hereinafter referred to as Defendant, was charged in this case with one count of delivery of cocaine (50 to 224 grams), one count of possession of cocaine (less than 25 grams), one count of resisting and obstructing a police officer, and one count of possession of marijuana. On July 13, 2001, Defendant appeared before the Honorable David F. Breck of the Oakland County Circuit Court and pleaded guilty to the charges against him in this case as well as in as a number of related cases.[1] On August 8, 2001, the trial judge sentenced Defendant as follows: he imposed a minimum term of eight years, and a maximum term of 20 years for the delivery conviction in this case—a deviation from the mandatory minimum sentence of 10 years. For the possession of less than 25 grams of cocaine and resisting and obstructing convictions in this case, the trial judge imposed a sentence of two years probation. For the possession of marijuana conviction in this case, the trial judge imposed a sentence of 146 days in jail (with credit for 146 days).

The Court of Appeals granted the People's delayed application for leave to appeal the trial judge's deviation from the mandated minimum sentence, but ultimately affirmed Defendant's sentence in an unpublished opinion per curiam dated October 18, 2002. (36a.)

This Court granted the People's application for leave to appeal in an order dated July 10, 2003, limited to the issues of: 1) whether "sentencing manipulation" or "escalation" is a substantial and compelling reason for deviating from a statutorily imposed mandatory minimum

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[1] In case number 2001-176292-FH, Defendant was charged with one count of possession of cocaine (less than 25 grams), one count of possession of marijuana, and one count of driving while license suspended. In case number 2001-177607-FH, Defendant was charged with delivery

(continued . . .)

sentence and, 2) whether a trial court may consider the legislative sentencing guidelines when determining the degree of a departure, which has already been determined to be supported by substantial and compelling reasons. *People v Claypool,* 468 Mich 944; 666 NW2d 664 (2003). (40a.)

On July 13, 2001, Defendant appeared before the trial court. His trial counsel indicated that Defendant was going to plead guilty to the charges against him in all of the cases. (9a-10a.)

After being placed under oath, Defendant indicated that he was 27-years-old. (10a.) He further stated that he had finished the 10th grade and had been obtaining a GED while in jail. (10a.) Defendant indicated that he could read, write and understand the English language. (10a) Defendant stated that his attorney had explained the nature of the charges to him and that he was satisfied with that explanation. (12a-13a.) He denied that his plea was the result of a plea bargain. (13a.) Defendant indicated that he understood that he had a right to an attorney, including a court appointed attorney. (13a.) Defendant further stated that he understood that there was a mandatory minimum sentence of 10 years and that, if he was currently on probation or parole, his conviction in this case could result in a violation of that probation or parole and result in him going to jail. (13a-14a.)

The trial judge then read to Defendant all of his constitutional and statutory rights associated with a trial (and an appeal), and Defendant indicated that he understood that he would be waiving all of those rights by pleading guilty. (14a.) He further indicated that he understood that his plea would result in convictions against him. (14a.)

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of cocaine (less than 50 grams), and delivery of marijuana. In case number 2001-177609-FH, Defendant was charged with one count of delivery of cocaine (less than 50 grams).

Defendant denied that anyone had promised him anything or threatened him in order to induce him to plead guilty. (15a.) He added that it was his own free choice to plead guilty. (15a.)

After establishing a factual basis for the plea,[2] Defendant stated that the answers on his plea form were truthful and that he was freely and voluntarily pleading guilty. (19a-20a.) Both the prosecutor and Defendant's counsel denied knowledge of any threats, promises, or inducements. (20a.)

The trial judge found that Defendant had freely and voluntarily pleaded guilty to all of the charges against him. (21a.) He set sentencing for August 8, 2001. (21a.)

The parties appeared on August 8, 2001, for Defendant's sentencing. Defendant's counsel indicated that he had reviewed the presentence investigation report in this case and found it to be factually accurate. (26a.) He added: "We have no additions or deletions to make to it." (26a.)

Defendant's counsel argued for a deviation from the mandatory minimum sentence required for the delivery (50 to 224 grams) conviction in this case. (26a.) He argued that Defendant was 26-years-old at the time that he committed the offenses in this case and that he "had only one prior misdemeanor in his criminal history." (26a.) Counsel stated that, at the time he committed these offenses, Defendant "was using approximately between three and five hundred dollars worth of crack or cocaine or heroin per week in his own drug addiction." (26a.)

Counsel next argued that, if Defendant had been arrested after the first buy, he would be facing a lesser sentence. (27a.) He argued that, instead, "the officer kept coming back to Mr. Claypool, asking him to get more drugs." (27a.) Defendant's counsel asserted that the "police

[2] As to the delivery offense in this case, Defendant admitted that he sold the undercover officer over 50 grams of cocaine and that he had agreed to a purchase of approximately four and a half ounces of cocaine. (17a-18a.)

officers wanted more buys to put more prison sentences on Mr. Claypool." (28a.) He added that Defendant had been paid $500 over and above the cost of the drugs, noting, "[t]his is a huge inducement to somebody and a huge incentive for somebody who has an addiction problem and is struggling to meet the costs of that addiction as well as to care for his family." (27a.)

The prosecutor argued that over 180 grams of cocaine in total had been involved in this case. (28a.) He noted, "[t]his isn't a case where the officers merely had an individual who could sell small amounts. He [Defendant] had obviously access to large amounts." (28a.) The prosecutor noted that the amount in the last transaction was 110 grams or over four ounces. (28a.)

The prosecutor explained why the officers attempted to purchase increasing amounts of cocaine from Defendant as follows:

> Contrary to Mr. Davis' assertion that the only reason officers continue to try to purchase from individuals is to get larger prison sentences, in cases such as this they are attempting to see how large or how far up the chain an individual is with regards to the amounts that they can deliver. This isn't a case where you can go right--in the drug trade you can't just go up to somebody you just meet and order four ounces of cocaine. There's a certain element of trust that needs to be built, especially when there's a first buy or a second buy.
>
> Therefore, I disregard Counsel's argument of sentence entrapment, but it's merely an investigative tool to see how large of a cocaine [sic] or how far up the chain an individual is.
>
> (28a-29a.)

The prosecutor also noted that Defendant was on bond for a possession of cocaine charge at the time he committed the delivery offenses. (29a.) The prosecutor argued that this showed that Defendant "was aware of the troubles he could get in with regards to further criminal activity." (29a.)

The trial judge then permitted Defendant to address the court. (29a.) Defendant stated that his actions were the result of his addictions and that, "I just wish the officers would have arrested me sooner, where I could have got some help instead of having me come to this point." (29a.)

The trial judge then indicated that he would deviate from the mandatory minimum sentence of 10 years for Defendant's delivery conviction in this case and instead impose an eight year minimum sentence:

> I do think that there are substantial and compelling reasons that are objective and verifiable to deviate below the mandatory minimum of 10 years, but not by much. Because you were on bond when this occurred. However, I'm impressed with the fact that you were 26 at the time and you had only a minimal record, which was really just shoplifting.
>
> Your employment history, you have been employed since 1998, and in fact, you were escalated. And I agree with you that it is unfortunate that you weren't arrested and charged originally because perhaps you would have been able to receive some treatment.
>
> This is the kind of case perhaps, now that we're starting this adult drug court--adult treatment court--that you'd be a--you would have been a candidate for.
>
> This deviation is only going to be by two years, which exceeds the maximum in the guidelines, which is 36 to 60 months.
>
> (30a.)

The trial judge then sentenced Defendant to two years probation on the possession of cocaine (less than 25 grams) conviction and the resisting and obstructing conviction in this case. (31a.) He imposed a 146-day jail term (with credit for 146 days) for the possession of marijuana conviction in this case. (31a.)[3]

[3] In the related cases, the trial judge sentenced Defendant as follows: In case number 2001-176292-FH, the trial judge sentenced Defendant to two years probation for possession of cocaine (less than 25 grams), 149 days in jail (with 149 days credit) for possession of marijuana, (continued . . .)

In an unpublished opinion per curiam, a panel of the Court of Appeals affirmed Defendant's sentence. The court found that the trial court had not abused its discretion in departing from the mandatory minimum sentence required in this case. Specifically, the court found that the trial court properly considered the government's purported "escalation" of the offenses committed by Defendant as a ground for departing from the mandatory minimum sentence:

> In *People v Shinholster,* 196 Mich App 531, 535; 493 NW2d 502 (1992), this Court held that the trial court properly considered the government's actions, which, while not constituting entrapment, purposefully escalated the defendant's crime, as one of several reasons justifying a downward departure.[3] We find the trial court's consideration of the government's role in the instant matter equally appropriate. The record indicates that defendant was arrested in December 2000 for possession of cocaine and marijuana, then released on bond. Thereafter, police officers made three successive purchases of crack cocaine from defendant. On March 7, 2001, the purchase price was $1,100 for one ounce. On March 12, 2001, the purchase price was $2,000 for 49.2 grams. On March 14, 2001, the purchase price was $4,000 for approximately 4.5 ounces. Thus, it objectively appears that the police made additional purchases that resulted in escalating the seriousness of the offenses of which defendant was convicted. This fact is verified in the PSIR and, pursuant to *Shinholster*, the trial court properly considered this factor as justification for a downward departure from the mandatory minimum sentence.
>
> [3] In *Fields, supra* at 78-79, three of the four justices in the majority agreed that this was a permissible factor to consider, with the fourth refusing to approve of *Shinholster* on the ground that "[t]he question of whether defendant's successive criminal acts not involving police entrapment can amount to a mitigating circumstance is far too significant to be resolved in the context of a

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and 93 days in jail (with 149 days credit) for driving while license suspended. (30a-31a.) In case number 2001-177607-FH, the trial judge sentenced Defendant to lifetime probation for delivery of cocaine (less than 50 grams) and two years probation for delivery of marijuana. (31a.) In case number 2001-177609-FH, the trial judge sentenced Defendant to lifetime probation for delivery of cocaine (less then 50 grams). (31a.)

> record that does not present that question." *Id.* at 82 n 1 (Boyle, J., concurring).
> *People v Claypool,* unpublished opinion per curiam of the Court of Appeals, decided October 18, 2002 (Docket No. 238984), at 2-3.
> (37a-38a.)

Additional pertinent facts may be discussed in the body of the argument section of this brief, *infra.*

ARGUMENT

I. A CLAIM OF SENTENCING MANIPULATION/ESCALATION SHOULD NOT, AS A MATTER OF LAW, BE A SUBSTANTIAL AND COMPELLING REASON JUSTIFYING A DEPARTURE FROM A STATUTORILY MANDATED MINIMUM SENTENCE.

At the time Defendant committed the offense in the present case, presumptively mandatory minimum sentences applied for certain drug offenses.[4] As applied to the delivery offense in this case, the statutorily mandated minimum sentence was 10 years for delivery of 50 to 224 grams of cocaine. MCL 333.7401(2)(a)(iii). The Legislature provided that sentencing judges could depart from this minimum sentence where there were "substantial and compelling" reasons to do so. MCL 333.7401(4). In the present case, the trial judge departed from the minimum sentence for several reasons, including his belief that Defendant had been "escalated." The People respectfully submit that the purported manipulation/escalation of Defendant's sentence was not a substantial and compelling reason for the trial court to depart from the statutorily mandated minimum sentence required by law.

Standard of Review:

The specific question this Court wishes the parties to address—"whether 'sentencing manipulation' or 'escalation' is a substantial and compelling reason justifying a downward departure from a statutorily imposed mandatory minimum sentence"—appears to be a matter of law that should be reviewed by this Court *de novo. People v Koonce,* 466 Mich 515, 518; 648 NW2d 153 (2002).

Discussion:

[4] Effective March 1, 2003, the Legislature eliminated the mandatory minimum provisions of MCL 333.7401 and MCL 333.7403. See 2002 PA 665.

In enacting the legislation that created the mandatory minimum sentences, the Legislature aimed to incarcerate drug dealers for long periods of time, both to remove them from society **and** to deter others from committing such crimes. *People v Fields,* 448 Mich 58, 67-68; 528 NW2d 176 (1995). In *Fields,* this Court noted that the Legislature did not intend that trial judges could easily depart from the mandatory minimum sentences:

> [I]t is evident that the words "substantial and compelling" constitute strong language. The Legislature did not wish that trial judges be able to deviate from the statutory sentences for any reason. Instead, the reasons justifying departure should "keenly" or "irresistibly" grab our attention, and we should recognize them as being "of considerable worth" in deciding the length of a sentence. *Id.* at 67.

See also: *People v Daniel,* 462 Mich 1, 10; 609 NW2d 557 (2000).

This Court has held that grounds for departure will exist "**only** in exceptional cases." *Fields, supra* at 68 (emphasis added). Moreover, "[t]he Legislature did not wish that trial judges be able to deviate from the statutory minimum sentences for any reason." *Id.* at 67. Only **objective and verifiable** factors may be considered by the sentencing judge in connection with a departure. *Id.* at 62, 68. Finally, as the court noted in *People v Johnson (On Remand),* 223 Mich App 170, 175 n 3; 647 NW2d 480 (1997), rev'd on other grounds 466 Mich 491; 647 NW2d 480 (2002), "the Legislature, with ***rare*** exception, intended that drug traffickers receive the mandatory minimum sentence." (Emphasis added.)

A. Defining "Sentencing Manipulation" and Distinguishing it from "Traditional" Entrapment and "Sentencing" Entrapment.

In granting the People leave to appeal, this Court directed the parties to brief whether "sentencing manipulation" or "escalation" is a substantial and compelling reason for departing from a statutorily required minimum sentence. (40a.) To properly answer this question, this

Court must first define "sentencing manipulation" and distinguish it from "traditional" entrapment, and "sentencing" entrapment.

"Sentencing manipulation" or "escalation"[5] is a claim that the government acted outrageously or improperly for the sole purpose of increasing a defendant's sentence. The focus here is on the conduct of the government and its agents. See *United States v Shephard,* 4 F3d 647, 649 (CA 8, 1993), cert den 510 US 1203; 114 S Ct 1322; 1277 L Ed 2d 671 (1994). A claim of sentencing manipulation is typically asserted when requesting a reduction in sentence. See *United States v Drozdowski,* 313 F3d 819, 825 n 3 (CA 3, 2002), cert den ___ US ___; 123 S Ct 1766; 155 L Ed 2d 525 (2003).

Sentencing manipulation should be distinguished from "traditional" entrapment, a defense that, if successful, results in the charge(s) against a defendant being dismissed. This Court has adopted a modified objective test for determining if a defendant was entrapped:

> Under the current entrapment test in Michigan, a defendant is considered entrapped if either (1) the police engaged in impermissible conduct that would induce a law-abiding person to commit a crime in similar circumstances or (2) the police engaged in conduct so reprehensible that it cannot be tolerated. *Juillet, supra; People v Ealy,* 222 Mich App 508, 510; 564 NW2d 168 (1997). However, where law enforcement officials present nothing more than an opportunity to commit the crime, entrapment does not exist. *People v Butler,* 444 Mich 965, 966; 512 NW2d 583 (1994).
>
> *People v Johnson,* 466 Mich 491, 498; 647 NW2d 480 (2002).

Whether entrapment has occurred is a question of law for the trial court to decide. See *People v D'Angelo,* 401 Mich 167, 177; 257 NW2d 655 (1977).

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[5] For simplicity's sake, hereinafter referred to as "sentencing manipulation."

Sentencing manipulation should also be distinguished from "sentencing" entrapment or "entrapment by escalation,"[6] which is a claim that, "a defendant, although predisposed to commit a minor or lesser offense, is entrapped into committing a greater offense subject to greater punishment." *United States v Stuart,* 923 F2d 607, 614 (CA 8, 1991), cert den 499 US 967; 111 S Ct 1599; 113 L Ed 2d 662 (1991). The focus here is on the defendant's predisposition, *United States v Sanchez,* 138 F3d 1410, 1414 (CA 11, 1998), cert den 525 US 967; 119 S Ct 414; 142 L Ed 2d 336 (1998), and the defense appears to have originated in the federal court system which, unlike Michigan, uses a *subjective* test to assess a defendant's claim that he was entrapped. Defendants have attempted to use claims of sentencing entrapment both to seek dismissal of charges against them [see *People v Ealy,* 222 Mich App 508; 564 NW2d 168 (1997)] or a reduction in sentence [see *United States v Miller,* 71 F3d 813, 815 (1996), cert den 519 US 842; 117 S Ct 123; 136 L Ed 2d 73 (1996)].

B. Both Defendant and the Trial Court Relied Upon Sentencing Manipulation to Deviate from the Statutorily Mandated Minimum Sentence in this Case.

In the present case, Defendant asserted, and the sentencing judge relied upon, a claim of sentencing manipulation rather than either traditional entrapment or sentencing entrapment to justify a departure from the statutorily mandated minimum sentence. In his sentencing memorandum, Defendant clearly argued that the police had engaged in sentencing manipulation, not traditional entrapment or sentencing entrapment:

> Moreover, if the police had arrested Mr. Claypool after the first sale (and there can be no good reason offered for their not arresting him in as much as they have had no inclination to have Mr. Claypool assist them in apprehending the person from whom

[6] For simplicity's sake, hereinafter referred to as "sentencing entrapment."

> he received the drugs), Mr. Claypool would not now be facing the draconian sentence before him. . . . .
>
> The only reason for not arresting him after the first buy on March 8, 2001, that makes any sense is that the police recognized that such a sentence would be appropriate and decided that they wanted to make sure that he was facing a long stint in prison. This should not be the function of the police. The length or nature of a sentence should be determined by the judge, and not be subjected to manipulation by the police whatever their intentions might be.
>
> [Defendant's Sentencing Memorandum, p 3 (24a.)]

Further, when deviating from the mandatory minimum sentence, the sentencing judge indicated that, because Defendant could have been arrested sooner than he was, he was denied treatment options that would have otherwise been available to him (30a), *not* that he believed that Defendant was induced by the police into committing a greater offense than he otherwise would have committed or that, while inclined to commit a minor offense, was entrapped into committing a greater offense.

With these terms clearly defined, and the fact that it was sentencing manipulation, not traditional entrapment or sentencing entrapment that was asserted by Defendant at his sentencing, the next step—examining how Michigan has approached this area of law—can be taken.

C. Michigan's Cases on Sentencing Manipulation to Date.

In *People v Shinholster,* 196 Mich App 531; 493 NW2d 502 (1992), lv den 443 Mich 852; 505 NW2d 579 (1993), the Court of Appeals addressed a claim by a defendant that the trial court should have departed from the mandatory minimum sentence of 10 years for his plea-based conviction of possession with intent to deliver 50 to 225 grams of cocaine. The court found that the defendant had cited substantial and compelling reasons for departing from the mandatory

minimum sentence including that "the government's actions—although not rising to the level of entrapment—purposefully escalated the crime." *Id.* at 535.

In 1995, when this Court decided *Fields,* a majority of the Justices of this Court *did not agree* that purposeful escalation of a crime was a valid basis for deviating from a mandatory minimum sentence. Rather, *only* three Justices agreed, citing *Shinholster*, that "escalation" was a permissible factor to consider in deviating from a statutorily mandated minimum sentence. *Fields, supra* at 78-79. Justice Boyle signed the lead opinion, but stated in a concurring opinion that, "[t]he question of whether defendant's successive criminal acts not involving police entrapment can amount to a mitigating circumstance is far too significant to be resolved in the context of a record that does not present that question." *Id.* at 82 n 1.

Because at least four of the sitting Justices did not agree on this point, *Fields* cannot be cited to validate sentencing manipulation as a substantial and compelling reason for deviating from a mandatory minimum sentence.[7] See: *People v Bono,* 249 Mich App 115, 119; 641 NW2d 278 (2002); *People v Gunnett,* 158 Mich App 420, 424; 404 NW2d 627 (1987). Furthermore, *Shinholster's* holding is of questionable value where only three Justices of this Court cited it with approval.

While *Ealy, supra,* which was released by the Court of Appeals in 1997, is sometimes relied upon to support claims of sentencing manipulation [see *People v Sosa,* unpublished opinion per curiam of the Court of Appeals, decided December 28, 1999 (Docket No. 213737), at 3-4 n 2 (45a-46a)], the defendant in *Ealy* in fact asserted that "that the police committed

[7] Nonetheless, at least one panel of the Court of Appeals has stated that this Court in *Fields* "approved" of the decision in *Shinholster*. *People v Rodriguez,* unpublished memorandum opinion of the Court of Appeals, decided December 16, 1997 (Docket No. 187060), at 2. (42a.)

'*sentencing entrapment*' by wrongfully inducing him to participate in offenses involving escalating amounts of cocaine and exposing him to greater penalties" *Id.* (emphasis added). The trial court rejected the defendant's claim, "instead concluding that the increase in the amounts of drugs involved was 'good and proper police work." *Id.* (emphasis added.)

On appeal, the Court of Appeals began its analysis by discussing the two-pronged test for "traditional" entrapment. *Id.* The court then stated:

> Although the issue of sentencing entrapment has not been addressed in Michigan, federal courts have considered the issue. In *United States v Staufer,* 38 F3d 1103, 1106 (CA 9, 1994), quoting *United States v Stuart,* 923 F2d 607, 614 (CA 9, 1991), the court indicated that sentencing entrapment occurs when " 'a defendant, although predisposed to commit a minor or lesser offense, is entrapped in committing a greater offense subject to greater punishment.' " See also *United States v Stavig,* 80 F3d 1241, 1245 (CA 8, 1996), quoting *United States v Aikens,* 64 F3d 372, 376 (CA 8, 1995), ("[S]entencing entrapment may occur where outrageous government conduct overcomes the will of a defendant predisposed to deal only in small quantities of drugs for the purpose of increasing the amount of the drugs and the resulting sentence imposed against that defendant.") and *United States v Garcia,* 79 F3d 74, 75 (CA 7, 1996).
>
> *Id.* at 510-511.

The court concluded that the police in the case "did nothing more than present defendant with an opportunity to commit the crimes of which he was convicted," noting in particular that "defendant did not hesitate in selling the officer increasing amounts and eventually sold him 250 grams." *Id.* at 511. The court added that "[t]here is no evidence that the police continued the purchases merely to enhance defendant's eventual sentence." *Id.* The court noted:

> The undercover officer testified that he purchased greater amounts of cocaine from defendant in order to determine defendant's selling capabilities and to discover the identity of defendant's supplier. Although defendant could have been arrested after any of the earlier transactions, the delay in his arrest was justified on the ground that an earlier arrest would have impaired the ability of the

> police to conduct an ongoing undercover narcotics investigation. See *People v Betancourt,* 120 Mich App 58, 62; 327 NW2d 390 (1982). See also *United States v Calva,* 979 F2d 119, 123 (CA 8, 1992) (police . . . must be given leeway to probe the depth and extent of a criminal enterprise, to determine whether coconspirators exist, and to trace the drug deeper into the distribution hierarchy).
>
> *Id.* at 511-512.

Finally, in addressing the defendant's claim that his sentence was disproportionately harsh, the court noted that the defendant had failed to present substantial and compelling reasons to justify a departure from the mandatory minimum sentences stating, among other things, that the defendant did not hesitate to provide "ever-increasing amounts of cocaine to the undercover officer." *Id.* at 512.

Ealy is a confusing opinion. First, as noted by Court of Appeals panel in *Sosa, supra* at 4 n 2 (46a), "[w]ithout ever adopting the defense, the *Ealy* Court chose to address the defendant's claim of sentencing entrapment." Second, while asserting that it was addressing a claim of sentencing entrapment, the court rejects the claim as though it were one of sentencing manipulation (i.e. by noting that there was no evidence that the police continued purchasing drugs from the defendant merely to enhance his eventual sentence). Finally, the opinion does not acknowledge that the modified objective test in Michigan for evaluating a claim of entrapment is inconsistent with the underlying subjective basis of a sentencing entrapment claim.

In short, those published cases which have addressed claims of sentencing manipulation in Michigan are either of questionable value (*Shinholster*), without precedential value (*Fields*), or confusing and unclear (*Ealy*).

D. This Court Should Hold that, as a Matter of Law, Sentencing Manipulation is Not a Substantial and Compelling Reason for Deviating from a Statutorily Mandated Minimum Sentence.

The theory underlying sentencing manipulation is that, where the police do not arrest a defendant after he has committed an offense, but instead allow him to commit additional more serious crimes (with greater penalties) for no apparent purpose other than to increase the defendant's ultimate sentence, the police are engaging in outrageous conduct so as to warrant giving the defendant a reduced sentence. See *United States v Cannon,* 886 F Supp 705, 708 (D ND, 1995), rev'd 88 F3d 1495 (CA 8, 1996). There are several serious flaws in this theory.

First, the United States Supreme Court has made it clear that a defendant has no constitutional right to be arrested when the police have established probable cause to do so. *Hoffa v United States,* 385 US 293, 310; 87 S Ct 408; 17 L Ed 2d 374 (1966). See also *People v McGee,* 247 Mich App 325, 346; 636 NW2d 531 (2001), lv gtd 467 Mich 915; 653 NW2d 779 (2002), citing *People v Anderson,* 88 Mich App 513, 515; 276 NW2d 924 (1979). Allowing a defendant to obtain a deviation from a statutorily mandated minimum sentence on the basis of sentencing manipulation would be contrary to this principle.

Second, "[t]he government is under no obligation to arrest an individual ***before*** he commits a crime." *United States v Spears,* 159 F3d 1081, 1986 (CA 7, 1998), cert den 528 US 896; 120 S Ct 228; 145 L Ed 2d 191 (1999) (emphasis added). In other words, the government is not obligated to "save the defendant from himself." *Id.,* quoting from *United States v Okey,* 47 F3d 238, 241 (CA 7, 1995).

Both of these points segue into one of the main reasons why allowing allegations of sentencing manipulation to be used as a reason to deviate from a mandatory minimum sentence is a bad idea. Allowing deviations from mandatory minimums on the basis of sentencing

manipulation would unnecessarily and unfairly restrict the discretion and judgment of the police and prosecutors.

The Ninth Circuit Court of Appeals explained this point as follows in *United States v Baker,* 63 F3d 1478, 1500 (CA 9, 1995), cert den 516 US 1097; 116 S Ct 824; 133 L Ed 2d 767 (1996):

> [Baker] asserts that . . . the government stretched out its investigation after it had sufficient evidence to indict. This may be true, but we decline to adopt a rule that, in effect, would find "sentence manipulation" whenever the government, even though it has enough evidence to indict, opts instead to wait in favor of continuing its investigation. *See Jones,* 18 F.3d at 1155.
>
> Such a rule "would unnecessarily and unfairly restrict the discretion and judgment of investigators and prosecutors." *Id. at 1145.* "Police . . . must be given leeway to probe the depth and extent of a criminal enterprise, to determine whether coconspirators exist, and to trace . . . deeper into the distribution hierarchy." *United States v. Calva*, 979 F.2d 119, 123 (8th Cir. 1992). *See also United States v. Shephard,* 4 F.3d 647, 649 (8th Cir. 1993), *cert. denied,* 510 U.S. 1203, 127 L. Ed. 2d 671, 114 S. Ct. 1322 (1994). Moreover, since the government bears the burden of proving its case beyond a reasonable doubt, it must be permitted to exercise its own judgment in determining at what point in an investigation enough evidence has been obtained. We reject Baker's sentencing manipulation argument.

This point was also well made by the Fourth Circuit Court of Appeals in *United States v Jones,* 18 F3d 1145, 1155 (CA 4, 1994):

> Just as it is not outrageous for law enforcement authorities proceeding in an undercover "buy" to attempt to bargain with a seller of narcotics into selling an amount which constitutes a crime for the sole purpose of obtaining a conviction, we find it not outrageous for the government to continue to purchase narcotics from willing sellers even after a level of narcotics relevant for sentencing purposes has been sold. We do not rest our decision upon a finding, as no doubt could be made, that the government had a legitimate purpose in continuing to conduct drug transactions with the appellants over an extended period of time, i.e., the hope of locating, apprehending and convicting [a co-conspirator]. We

> decline to impose a rule that would require the government to come forward with a purpose or motivation other than its responsibility to enforce the criminal laws of this country, as a justification for any particular step undertaken as part of an investigation. We also decline to adopt a similar rule that would require district courts to speculate as to the motives of, or to ascribe motives to, law enforcement authorities. Due process requires no such ruminations.
>
> (Footnotes and citations omitted.)

Next, it is illogical to permit a defendant, who either did not raise a claim that the government engaged in improper conduct or did not prevail on such a claim to then argue at sentencing that he is entitled to a deviation from a mandatory minimum sentence on essentially the same claim. In other words, a defendant is given "two bites of the same apple" for no valid reason. As stated by the Fourth Circuit Court of Appeals in *Jones, supra* at 1154:

> We would note our skepticism as to whether the government could ever engage in conduct not outrageous enough so as to violate due process to an extent warranting dismissal of the government's prosecution, yet outrageous enough to offend due process to an extent warranting a downward departure with respect to a defendant's sentencing.

A similar view was expressed by the Seventh Circuit Court of Appeals in *United States v Cotts,* 14 F3d 300, 306 n 2 (CA 7, 1994):

> There is no doubt that by providing advance notice of the sentencing consequences associated with particular drug transactions the [federal] Sentencing Guidelines grant the government, in the carrying out of its investigative and prosecutorial functions, great power to dictate the options which will ultimately be available to the sentencing court. Several courts of appeals have intimated that sentencing adjustment may be in order when the government structures its stings solely with an eye toward wielding that power. *See, e.g., United States v. Calva,* 979 F.2d 119, 122-23 (8th Cir. 1992); *United States v. Connell,* 960 F.2d 191, 194-95 (1st Cir. 1992). Our inclination, however, is not to subject isolated government conduct to a special brand of scrutiny when its effect is felt in sentence, as opposed to offense, determination. If we are willing to accept the assumption

> apparently approved by Congress that dealing in greater quantities of drugs is a greater evil, it is not clear to us what the precise legal objection in this area could be (so long as it does not rise to the level of true entrapment or conduct "so outrageous that due process principles would absolutely bar the government from invoking judicial processes . . . ," *United States v. Russell,* 411 U.S. 423, 431-32, 36 L. Ed. 2d 366, 93 S . Ct. 1637 (1973)).

Finally, a ruling from this Court that deviations from statutorily mandated minimum sentences can be based on claims of sentencing manipulation would exacerbate the separation of powers issues already created by the "traditional" entrapment defense. As this Court noted in *Johnson, supra* at 509, there are "serious questions regarding the constitutionality of *any* judicially created entrapment test in Michigan." (Emphasis original.)

The separation of powers[8] issues raised by the "traditional" entrapment defense were discussed by Justice Corrigan in her dissent to the order vacating a grant of leave to appeal in *People v Maffett,* 464 Mich 878; 633 NW2d 339 (2001). In that dissent, Justice Corrigan noted: "The regulation of law enforcement practices involved in the investigation and detection of crime falls within the police power of the legislative branch." *Id.* at 897-898. She added: "[T]he direct effect of the [entrapment] defense is to absolve of responsibility persons whose conduct is deemed criminal by the Legislature." *Id* at 898. She further noted: "[T]he judicial branch lacks the authority to oversee the executive branch by wielding a 'chancellor's foot' veto over disfavored law enforcement practices." *Id.*

These same concerns exist whether the judiciary is dismissing a charge due to

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[8] Const 1963, art 3, § 2 provides:

> The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of (continued . . .)

"disfavored law enforcement practices" or giving a defendant a reduced sentence because of these same practices. In both situations, the judiciary is attempting to regulate the conduct of law enforcement and thereby interfering with the functions of both the legislative and executive branches.

In short, sentencing manipulation is not, as a matter of law, a substantial and compelling reasons to deviate from a statutorily imposed mandatory minimum sentence.

E. Even if this Court were to Hold that Sentencing Manipulation can be a Substantial and Compelling Reason for Deviating from a Statutorily Mandated Minimum Sentence, there was no Objective or Verifiable Evidence that Sentencing Manipulation Occurred on the Facts of this Case.

Even were this Court to find that claims of sentencing manipulation can be used to deviate from a statutorily mandated minimum sentence, the facts of this case do not support a deviation as there was no "objective and verifiable" evidence of sentencing manipulation.

The only "evidence" presented in this regard consisted of statements made by Defendant's attorney in his sentencing memorandum and at the sentencing proceeding that the "only" possible explanation for the failure to arrest Defendant sooner was to make sure that he would spend a long time in prison. On the other hand, the prosecutor offered a number of reasons why the police did not arrest Defendant after the first buy. The prosecutor indicated that the officers were attempting to discover what amounts of drugs Defendant would be able to sell—a legitimate law enforcement purpose under the authorities cited *supra*. He added that the officer could not initially ask to purchase four ounces of cocaine from Defendant because trust had to be established between the officer and Defendant through a number of smaller purchases. (28a-29a.)

> one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

The People would further note that Defendant pleaded guilty *unconditionally* to the charges against him, without having previously requested any kind of hearing (preliminary examination, entrapment hearing) to set forth a record basis for the claims he made at sentencing.

Finally, there is nothing in the presentence investigation report[9] indicating: 1) that Defendant "expressed any hesitancy in providing ever-increasing amounts of cocaine to the undercover officer" (see *Ealy, supra* at 512) despite being on bond for another offense or, 2) that the undercover officer bought increasing amounts of cocaine from Defendant for reasons other than legitimate law enforcement purposes.

F. Conclusion.

This Court should now rule, as a matter of law, that a claim of sentencing manipulation/escalation cannot be a substantial and compelling reason for deviating from a statutorily mandated minimum sentence. However, even were this Court to find that a claim of sentencing manipulation can be used to support such a deviation, there was no objective and verifiable evidence to support a deviation for this reason on the facts of this case.

[9] Eight copies of which are being sent to this Court under separate cover.

II. A SENTENCING JUDGE SHOULD NOT BE PROHIBITED FROM USING THE LEGISLATIVE SENTENCING GUIDELINES TO ASSIST IN DETERMINING THE DEGREE OF A DEPARTURE AFTER HAVING ALREADY DECIDED TO DEVIATE FROM A STATUTORILY MANDATED MINIMUM SENTENCE BASED ON A SUBSTANTIAL AND COMPELLING REASON.

In its order granting leave to appeal in this case, this Court asked the parties to brief "whether a trial court may consider the legislative sentencing guidelines recommendation when determining the degree of a departure [from a statutorily imposed mandatory minimum sentence], which has already been determined to be supported by substantial and compelling reasons." *Claypool,* 468 Mich at 944. (40a.) The People believe that, consistent with this Court's decision in *People v Babcock,* 469 Mich 247; 666 NW2d 231 (2003), the answer to this question is, "yes."

Standard of Review:

The People believe that the question contained in this Court's order granting leave is a matter of law that should be reviewed by this Court *de novo. Koonce, supra.*

Discussion:

At the time that Defendant committed the offenses in this case, the legislative sentencing guidelines were applicable to the delivery offense in this case. See MCL 777.13. In other words, the sentencing judge was required to score the sentencing guidelines for this offense. However, the instructions to the legislative sentencing guidelines also indicate that, "[i]f a crime has a mandatory determinant penalty . . . , the court shall impose that penalty" and that the usual requirements with regard to use of the sentencing guidelines are not applicable. MCL 769.34(5). See also *Babcock, supra* at 254, n 4 ("Neither the judicial nor the statutory sentencing guidelines would supersede a mandatory sentence.")

The Court of Appeals in *People v Izarraras-Placante,* 246 Mich App 490, 498-499; 633

NW2d 18 (2001), lv den 466 Mich 853; ___ NW2d ___ (2002), applied principles of statutory construction to reconcile these provisions and held that a sentencing judge who has already decided to depart from a mandatory minimum sentence for a substantial and compelling reason could use the legislative sentencing guidelines to determine the magnitude of the departure:

> The statutory sentencing guidelines, MCL 777.1 *et seq.*, MCL 777.13, and the controlled substances act, MCL 333.7401 *et seq.*, address sentences for drug offenders. Statutes that relate to the same subject or share a common purpose are "in pari materia" (literally, "upon the same matter or subject"). [*People v Webb,* 458 Mich 265, 274; 580 NW2d 884 (1998)]; *People v Stephan,* 241 Mich App 482, 497; 616 NW2d 188 (2000). Such statutes must be read together as one law, even if they contain no reference to one another and were enacted on different dates. *Webb, supra* at 274; *Stephan, supra* at 497. When construing statutes that are in pari materia, our goal is to further legislative intent by finding an harmonious construction of the related statutes, so that the statutes work together compatibly to realize that legislative purpose. *Id.* at 497-498. Accordingly, if two statutes lend themselves to a construction that avoids conflict, then that construction should control. *Webb, supra* at 274; *Stephan, supra* at 498. "When construing a statute, the court should presume that every word has some meaning and should avoid any construction that would render the statute, or any part of it, surplusage or nugatory." *Id.* at 497.
>
> Employing these principles and construing the two statutes, we believe that it is inappropriate to rely on the recommended minimum sentence under the guidelines as a substantial and compelling reason to depart from the mandatory minimum terms prescribed by the statute. Instead, we reconcile these statutory provisions by concluding that only in cases where substantial and compelling reasons exist to warrant a departure may the court then consider the guidelines in determining the magnitude of the departure. Our conclusion is consistent with the recognized legislative goals of "keep[ing] drug dealers in prison for long periods, both to remove them from society and to deter others from following their example." *Fields, supra* at 67-68.

The People agree with the reasoning of *Izarraras-Placante.* Obviously, the Legislature wanted sentencing guidelines to be scored even where it also mandated a specific minimum

sentence. The Legislature did not indicate the purpose of scoring the guidelines for offenses that require a specific minimum sentence.[10] As such, the court in *Izarraras-Placante* correctly applied the principle of in pari materia to harmonize the two statutory requirements.

The reasoning of this Court in *Babcock, supra*, in which the Court addressed the question of departures from the legislative sentencing guidelines (where the phrase "substantial and compelling reason" is also used by the Legislature) supports the conclusion of the court in *Izarraras-Placante.*

In *Babcock, supra* at 263-264, this Court noted that the sentencing guidelines provide a sentencing judge with a range of proportionate sentences that take into account the severity of the offense and the defendant's criminal history:

> The Legislature has subscribed to [the] principle of proportionality in establishing mandatory sentences as well as minimum and maximum sentences for certain offenses. See [*People v Milbourn,* 435 Mich 630, 635-636; 461 NW2d 1 (1990)]. It has also subscribed to this principle of proportionality in establishing the statutory sentencing guidelines. Under the guidelines, offense and prior record variables are scored to determine the appropriate sentence range. Offense variables take into account the severity of the criminal offense, while prior record variables take into account the offender's criminal history. Therefore, the appropriate sentence range is determined by reference to the principle of proportionality; it is the function of the seriousness of the crime and of the defendant's criminal history.

This Court further stated that determining the *extent* of a departure from the legislative sentencing guidelines should likewise be driven by the goal of attaining a proportionate sentence. *Id.* at 272.

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[10] Interestingly, the instructions to the *judicial* sentencing guidelines, which were replaced by the legislative sentencing guidelines, provide an explanation ("[i]n order to develop (continued . . .)

Applying this reasoning to departures from statutorily mandated minimum sentences (which, according to this Court, are also an expression by the Legislature of a proportionate sentence for a particular offense), if a sentencing judge believes, for a substantial and compelling reason, that a mandatory minimum sentence will result in a disproportionate sentence, the legislative sentencing guidelines provide the judge with a range of minimum sentences that take into account the factors the Legislature has deemed appropriate for the offense and offender.

This is not to say that a deviation from a statutorily mandated minimum sentence should always (or even most of the time) result in a sentence within the range provided for by the legislative sentencing guidelines. However, the legislative sentencing guidelines can be a guide to a sentencing judge in fashioning an appropriate sentence once a decision to depart is made.[11]

The People recognize that there is a danger that, a sentencing judge may—as the People believe happened in this case—use any disparity between the range provided for by the legislative sentencing guidelines and a statutorily mandated minimum sentence *as a reason in and of itself* to depart from a mandatory minimum sentence, possibly even subconsciously. However, a clear statement from this Court prohibiting use of the legislative sentencing guidelines in this manner should prevent this from occurring. The People would further note that

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guidelines for Habitual Offenders") for why guidelines were to be scored for habitual offenders even though they did not apply to such offenders.

[11] Concurrent with its elimination of the mandatory minimums, the Legislature amended the statutory sentencing guidelines with regard to controlled substance offenses. See 2002 PA 666. Among the changes to the guidelines in this regard was a restructuring of Offense Variable 15. This restructuring not only brought the guidelines in line with the amended statute, but also, when read in context, assessed more points for aggregate amounts of controlled substances than under the previous version of the legislative sentencing guidelines. This could be viewed as an expression by the Legislature that, in light of the elimination of the mandatory minimum sentences, the guidelines applicable to those offenses needed to be reworked to provide for longer prison terms.

such a risk is present irrespective of this Court's ruling on the issue presented because, pursuant to the relevant statutes, the guidelines must be scored regardless of the existence of a statutorily mandated minimum sentence.

Conclusion:

A sentencing judge should not be prohibited from using the legislative sentencing guidelines to determine the extent of a departure from a statutorily mandated minimum sentence once he has already decided to deviate from that minimum sentence based on a substantial and compelling reason.

RELIEF

WHEREFORE, David G. Gorcyca, Prosecuting Attorney in and for the County of Oakland, by John S. Pallas, Assistant Prosecuting Attorney, respectfully requests that this Honorable Court reverse the opinion of the Court of Appeals in this matter, vacate Defendant's sentence for delivery of cocaine (50 to 224 grams), and remand this case to the Oakland County Circuit Court for further proceedings.

Respectfully Submitted,

DAVID G. GORCYCA
PROSECUTING ATTORNEY
OAKLAND COUNTY

JOYCE F. TODD
CHIEF, APPELLATE DIVISION

By: _____
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Assistant Prosecuting Attorney

DATED: September 29, 2003